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SUNDARAM SUBRAMANIAM v. ALAMRIO PROPERTIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN JC
[SUIT NO: 22NCC-268-09-2015]
29 JUNE 2016

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MONEYLENDERS: *Moneylending transaction – Monies due and owing – Claim for – Whether plaintiff carried out business of moneylending – Whether plaintiff was a moneylender – Whether loan transaction fell under definition of moneylending under Moneylenders Act 1951*

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The plaintiff entered into a friendly loan agreement with the first defendant at the request of the second defendant to assist the first defendant to fund the initial construction cost of a housing project. In consideration of the plaintiff providing the friendly loan to the first defendant, the second to the fifth defendants executed an unconditional and irrevocable joint and several guarantee in favour of the plaintiff. The plaintiff obtained an overdraft facility from a bank and thereafter issued cheques totalling RM800,000 to the first defendant. The first defendant subsequently failed to make the repayments of the loan sum. The plaintiff then issued a letter of demand demanding the repayment of the loan sum of RM800,000 together with an agreed interest of RM273,200 since the plaintiff had to pay interest to the bank for the utilisation of the overdraft facility ('the loan sum'). The plaintiff also issued a letter of demand to the second to the fifth defendants notifying them of the first defendant's failure to repay the loan sum. Despite the letter of demand, the defendants failed to remedy the loan sum demanded. The plaintiff then initiated an action against the defendants claiming for the sum of RM789,000 after taking into account a repayment of RM11,000 by the first defendant prior to the commencement of the action. The agreed interest sum of RM273,200 remained unpaid. On the other hand, the defendants counterclaimed against the plaintiff. According to the defendants, the loan transaction was in contravention of the Moneylenders Act 1951 ('the Act') and since the plaintiff was not a licensed moneylender, the transaction was therefore void and unenforceable. The issue that arose for determination was whether the loan transaction fell under the definition of moneylending under the Act.

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Held (allowing plaintiff's claim and dismissing defendants' counterclaim):

(1) There was no evidence to show that the plaintiff was carrying the business of moneylending. It was the second defendant who prompted the plaintiff to lend the money. It was more of a relationship between friends where one seeks help from the other. This is also not the case where the plaintiff in actual fact has ready money to lend to the borrower. The plaintiff himself had to get the money from an overdraft facility. The circumstances of this case do not fit the requirement of s. 2 of the Act. (paras 20-22)

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(2) It was not a straightforward case where one moneylending transaction with interest can be treated as moneylending business. The Act is not concerned with moneylending but rather the moneylenders. From the facts and circumstances of the case, it is just too remote to say that there exists a moneylending business that the plaintiff was operating on the defendants. (para 27)

(3) There is no system and continuity in moneylending transaction exercised by the plaintiff. The presumption provided in s. 100 of the Act is a rebuttable presumption and the plaintiff had successfully rebutted the said presumption as he had proven that he is not a moneylender. The defendants failed to overcome two hurdles in this case *ie*, that the loan was a moneylending transaction and secondly that the plaintiff was carrying the business of moneylender at the material time. The interest was computed and offered by the first defendant and accepted by the plaintiff. It was unjust for the defendants after benefiting from the loan given to now claim that the loan transaction was void and unenforceable based on the interest element that was proposed and accepted by both parties. Therefore, the plaintiff had proven his case on a balance of probabilities. (paras 35 & 36)

Case(s) referred to:

Chow Yoong Hong v. Choong Fah Rubber Manufactory [1960] 1 LNS 17 PC ***(refd)***
Lam Kee Ying Sdn Bhd v. Kam Loong Mining Sdn Bhd [2014] 1 LNS 161 HC ***(refd)***
Muhibbah Teguh Sdn Bhd v. Yaacob Mat Yim [2005] 4 CLJ 853 HC ***(refd)***
Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1979] 1 LNS 60 FC ***(refd)***
Pan Global Equities Sdn Bhd & Anor v. Taisho Company Sdn Bhd [2005] 3 CLJ 734 CA ***(refd)***
Yeep Mooi v. Chu Chin Chua & Ors [1960] 1 LNS 169 FC ***(refd)***

Legislation referred to:

Moneylenders Act 1951, ss. 2, 10O, 17A(1)

For the plaintiff - Jananee Gopal & K Ramesh; M/s Chellam Wong
For the defendants - Andrew Davis & Zaitul Naziah Mohd Soib; M/s Andrew Davis & Co

Reported by Sandra Gabriel

JUDGMENT

Noorin Badaruddin JC:

[1] This is an action by the plaintiff against the defendants for the repayment of a friendly loan of RM800,000 together with interest of RM273,200. The plaintiff then claims the sum of RM789,000 after taking into account the repayment of the loan by the first defendant of RM11,000. The agreed interest sum of RM273,200 remains unpaid.

[2] The defendants on the other hand counterclaims against the plaintiff as follows:

(i) a declaration that the friendly loan agreement dated 28 March 2013 and/or all related transactions thereof are null and void;

(ii) a declaration that the joint and several guarantee agreement dated 28 August 2013 and/or related transactions thereof are null and void; and

(iii) costs

Background Facts

[3] On 28 August 2013, the plaintiff had entered into a friendly loan agreement ('P4') with the first defendant at the request of the second defendant to assist the first defendant to fund the initial construction cost of a housing project in Sentul, Kuala Lumpur. Pursuant to the terms of the friendly loan agreement, the plaintiff had agreed to provide a friendly loan up to the sum of RM1.2 million to the first defendant.

[4] In consideration of the plaintiff providing the friendly loan to the first defendant, the second to the fifth defendants had executed an unconditional and irrevocable joint and several guarantee on 28 August 2013 ('P3') in favour of the plaintiff.

[5] The plaintiff obtained an overdraft facility with the CIMB Bank in Penang and had between 3 September 2013 and 7 April 2014 issued cheques totalling RM800,000 to the first defendant ('P11'). Subsequently at the request of the defendants the loan sums was capped at RM800,000 as the defendants managed to get other source of fund to manage their project.

[6] It was the plaintiff's case that since he has to pay interest to his bank for the utilisation of the overdraft facility, the defendants had agreed to pay the plaintiff an agreed interest of RM270,200 for the friendly loan of RM800,000. Exhibit P8 is the first defendant's letter dated 23 April 2014 to the plaintiff enclosing the revised repayment proposal as requested by the plaintiff. The repayment proposal includes the agreed interest as at 31 October 2015 to be RM273,200.

[7] By virtue of cl. 3.1 of the friendly loan agreement, the loan shall be repayable within one (1) year from the date of the agreement. However, at the request of the first defendant, the repayment was extended to end of January 2015 which the plaintiff agreed.

[8] All is well until the defendants then failed to make the repayment despite the extension of time given. On 26 February 2015, the plaintiff issued a letter of demand through his solicitors demanding the repayment of the loan sum of RM800,000 together with interest of RM273,200 ('P10') and despite the letter of demand the first defendant failed to pay the sum demanded.

[9] The plaintiff had also issued a letter of demand to the second to the fifth defendants ('P9') notifying them the first defendant's failure to repay the friendly loan and thus pursuant to the terms of the unconditional and irrevocable joint and several guarantee of 28 August 2013, but despite the demand, the second to the fifth defendants failed to make any payment.

[10] It is to be noted that prior to the filing of this action, the first defendant made a payment totalling RM11,000 only as repayment of the loan.

The Defendants' Contentions

[11] The defendants submitted that based on the evidence led in this court, the defendants have established that the plaintiff is not a licensed moneylender and there were interest elements in the loan transaction entered between the parties which render the same contravening the Moneylenders Act 1951 ('the Act'). From the undisputed fact seen from the pleadings, contemporaneous documents and evidence led by the parties during the trial, the defendants contended that the loan transaction was tainted with the interest element.

[12] According to the defendants, the loan transaction was in contravention of the Moneylending Act 1951 and in view of the plaintiff is not a licensed moneylender, the transaction is therefore void and unenforceable. That is the only issue in this matter ie, whether the loan transaction falls under the definition of moneylending under the Act and whether it contravenes the said Act and if so, the transaction is therefore void and unenforceable.

The Court's Findings

[13] The facts and circumstances revealed during the trial apparently show that the first defendant was facing cash flow issues around 2013 and the second defendant ('DW1') had approached the plaintiff to assist the first defendant. The plaintiff agreed to provide the loan and DW1 as the Chief Executive Officer ('CEO') of the first defendant knew that the plaintiff had the overdraft facility. DW1 admitted that the third defendant and him executed the agreement dated 28 August 2013 and DW1 further admitted to the signing of the unconditional and irrevocable joint and several guarantee. DW1 also admitted that he did receive the demand from the plaintiff's solicitors.

[14] The first defendant received the RM800,000 from the plaintiff pursuant to the friendly loan agreement. The loan was to be repaid by 30 September 2014 but the first defendant could not settle the loan and requested for an extension of time. The interest sum of RM273,200 was proposed by the first defendant due to the fact that the plaintiff himself has taken overdraft facility and he himself serving interest to the bank. It was the first defendant that computed the interest rate of 4% daily rest as reflected in the annexure to the first defendant letter dated 23 April 2014 ('P8'). A sum of RM11,000 was then paid by the defendants to the plaintiff as repayment towards the friendly loan.

[15] There was also no denial by DW1 in his evidence that he executed the unconditional and lrrevocable joint and several guarantee and he was aware of the letter of demand that was sent to him.

[16] As to the legal issue it is important for this court to take cognisance to the purpose of the Act being promulgated. On this point, Gopal Sri Ram JCA (as he then was) succinctly stated in *Pan Global Equities Sdn Bhd & Anor v. Taisho Company Sdn Bhd* [2005] 3 CLJ 734 that the spirit and intendment of the Act is to protect individuals from the jaws of unlicensed lenders. Whether a transaction is designed within the perimeters of the Act depends on the facts of each case. The test is what is the true nature of the relationship of the parties? That is what the court should examine. In *Pan Global Equities Sdn Bhd* (*supra*), it was decided from the fact of the case that the relationship was between shareholders and the company and not between moneylenders and a borrower. In that case, the respondent was a shareholder in the appellant's company. The appellants were then financially strained. Urgent cash was required from time to time to keep the appellant afloat. The respondent was creditworthy and furnished the cash by borrowing funds from its bankers. The respondent charged interest on the monies advanced. Later the shareholding of the appellant changed hands. The new shareholder took the position that the appellant is not indebted to the respondent and raised *inter alia* a defence that the loans were revocable as the respondent was an unlicensed moneylender.

[17] The Court of Appeal through the judgment of His Lordship Gopal Sri Ram JCA (as he then was) in rejecting the defence elaborated as follows:

> Learned counsel for the second appellant says that the learned judge was wrong in taking the approach he did because the respondent's memorandum of association sets out one of its objects as that of moneylending. With respect we think that counsel has addressed the wrong target. The real issue before the learned judge was the true nature of the relationship between the respondent and the appellants at the material time. And that relationship was one of a shareholder and his company. It was in its capacity as shareholder that the respondent advanced monies to the respondent. This is therefore not a case of the respondent carrying on the business of moneylending on the facts. It is commonplace in the corporate environment for shareholders or directors of a company to advance it funds at interest to tide it over difficult periods of financial hardship. Such transactions are necessary for keeping companies in a position to meet their debts as and when they fall due. If the courts proceed to treat these transactions as pure moneylending within the Moneylenders Act 1951, then no shareholder or director will ever be able to recover genuine advances *albeit* bearing interest made to his or her company during a time of want. Business in the corporate sector as we know it will come to a literal standstill and companies instead of looking to survival will face extinction.

Now, I am entirely conscious of the line of cases where judges of great distinction have pronounced upon the interpretation to be given to s. 3 of the 1951 Act. It suffices if I mention *Chellappah v. Official Assignee* [1970] 1 LNS 152; [1971] 1 MLJ 24, where Suffian FJ said:

> The question here is, was the appellant a moneylender within the meaning of the Ordinance? If he was, then the decision of the official assignee was right. The Privy Council has pronounced on the effect of the presumption under section 3 (which does not exist in the equivalent English legislation) in *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] MLJ 74 PC. Delivering the advice of their Lordships, Lord Devlin said at page 77:
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> > The effect of [section 3] has been considered by Thomson J (as he then was) in *Sadhu Singh v. Sellathurai* [1955] 1 LNS 137; [1955] MLJ 117 in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence that there were sufficient other transactions of a similar sort to amount to a carrying on of business.
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> It will be seen that proof of a single loan made to the debtor at interest raised a presumption that there were sufficient other transactions of a similar sort to amount to a carrying on of the business of moneylending by the appellant. (Suffian FJ's emphasis).

The facts of the cases decided under s. 3 of the 1951 Act are far different from the present. In my judgment, the 1951 Act, by its spirit and intendment is designed to protect individuals who because of their impoverishment are caught in the jaws of unlicensed lenders. It was certainly not designed to apply to fact patterns such as those that exist in the present instance. I would therefore respectfully agree, *albeit* for slightly different reasons, with the learned judge on his finding that the loans made in the present case are not caught by the 1951 Act.

[18] Not only that this court should examine the true relationship between the parties but also whether the loan transaction fulfilled the elements set out in s. 2 of the Act.

[19] Section 2 of the Act defines 'Moneylender' to mean:

> any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending whether or not he carries on any other business.

[20] This court found that the facts of the case disclosed that the plaintiff did not hold himself out or advertised nor announces that he is carrying a moneylending business. Nowhere in evidence to show that he was going around looking for clients to offer moneylending. At the risk of repetition this court found that instead, it was DW1 who prompted the plaintiff to lend the money. It was more of a relationship between friends where one seeks help from the other. DW1 needed financial help to start up his construction business and it was on that basis the plaintiff agreed to render his assistance through giving of the friendly loan. It was not the plaintiff who went to look out for moneylending business opportunity.

[21] This is also not the case where the plaintiff in actual fact has ready money to lend to the borrower. Instead this is a case where the plaintiff himself had to get the money from an overdraft facility which he had obtained. The plaintiff testified that he is a consultant engineer with a company known as Syarikat Perunding Era Zaman Sdn Bhd and he is not involved in any moneylending business. He further testified that he has never given loan with interest to any other party before. This court also found that the defendants in actual fact did not put their case that the plaintiff was indeed carrying out moneylending business.

[22] Indeed there is a glaring distinction that can be drawn from a clear moneylending business with the plaintiff's case here. In other words, the circumstances of this case do not fit the requirement of s. 2 of the Act. There is no evidence to show that the plaintiff was carrying the business of a moneylending. No evidence before this court that the plaintiff had ever given loan to anybody with or without interest. No rebuttal as to this fact either. No suggestions whatsoever were put that the plaintiff was carrying a moneylending business. The attack was that the plaintiff did not have the moneylending license. That attack does not fit the requirement that the plaintiff was doing a moneylending business as required under the Act.

[23] The Federal Court in *Yeep Mooi v. Chu Chin Chua & Ors* [1960] 1 LNS 169; [1981] 1 MLJ 14 observed as follows:

> We have on another occasion observed that the Moneylenders Ordinance, 1951 does not strike at moneylenders and at the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public who lends money even at interest, unless he does so as a business (*Ngui Mui Khin & Anor v. Gillespie Bros & Company Ltd* [1980] 2 MLJ 91).

[24] It cannot be gainsaid that the cases prior to the amendment are no longer suitable or applicable to the present Act as the principles in all those authorities prior to the amendment of the Act are still quoted and adopted in recent cases. The case of *Lam Kee Ying Sdn Bhd v. Kam Loong Mining Sdn Bhd* [2014] 1 LNS 161 fortified this aspect. In that case, the defendant was found not to be a moneylender within the meaning of the Act as the defendant did not carry on, advertises, announce himself or held himself out in any way as carrying on the business of moneylending. The principles laid down in *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60; [1980] 2 MLJ 9 and *Yeep Mooi v. Chu Chin Chua & Ors* [1981] 1 MLJ 14 were followed.

[25] In *Ngui Mui Khin v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60; [1980] 2 MLJ 9, the Federal Court observed:

> At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court. We make this simple and obvious observation because it was canvassed very strongly before us by counsel for the appellants that since the transactions between the respondents and the client are moneylending transactions, the respondents must be a moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender. He is a moneylender if within the meaning of section 2 of the Ordinance he can be said to be a person "whose business is that of moneylending". To prove business requires some sort of continuity or system or repetition of similar transactions. (*Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1962] AC 209 218 [1962] MLJ 74). If business of moneylending cannot be proved by factual evidence so as to make a person a moneylender, presumption under section 3 can be prayed in aid. Here if it is proved that "a person lends a sum of money in consideration of a larger sum being repaid" such person is presumed to be a moneylender unless the contrary is proved. However, section 2 and section 3 of the Ordinance excludes a number of persons, organisations and societies from the scope of the definition and presumption of a moneylender. These two sections, therefore, do not regard their businesses as those of moneylending, though the transactions of which they are parties involve the lending of money. One such person specially excluded from being a moneylender is mentioned in paragraph (c) of section 2 of the Ordinance. He is "any person … *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and the purposes whereof he lends money". The English Moneylenders Act, 1900 contains a similar exclusion clause, which has been the subject of many judicial decisions. The principle established by all these decisions, we respectfully agree, is that the question whether a

A person is a moneylender or not is one of fact and that our task is to see whether the primary or principal object of his business as distinguished from incidental parts of his business is one of moneylending.

[26] This court found that this is a case where the provisions of the Act are inapplicable to the plaintiff. As stated earlier, this case is all about the B plaintiff who had borrowed money to assist a friend who was in need of fund. The plaintiff then tried to recover the money he has lent and the interest his friend has offered to pay.

[27] It is not a straightforward case where one moneylending transaction with interest can be treated as moneylending business. The Act is not C concerned with moneylending but rather the moneylenders. From the facts and circumstances of the case, it is just too remote to say that there exists a moneylending business that the plaintiff was operating on the defendants.

[28] This court is mindful that there is a presumption that could assist the borrower. A single transaction can still be good enough to raise this D presumption. But in this case, this court found further that the plaintiff has successfully rebutted the presumption as this court has stated earlier that it found no evidence of some degree of system and continuity of a moneylending transaction exist. The Privy Council in *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] MLJ 74 PC had E the opportunity to explain as to what moneylending business is all about:

To lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions.

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[29] No evidence was proffered to show that there was any degree of system and continuity that the plaintiff had exercised that leads to even a presumption he was carrying a moneylending transactions. This court found the presumption even if it exists, is rebutted.

G **[30]** Some other additional issues were raised by the defendants. The defendants contended that the friendly loan agreement dated 28 August 2013 stated that the plaintiff agreed to lend a loan free of interest of RM1,200,000 to the first defendant but the actual agreement between the parties is that the loan sum shall only be RM1,000,000 whereas the sum of RM200,000 is the H interest factor to be added upon the loan in consideration of the plaintiff agreement to lend the money. The defendants highlighted to this court that even though the overdraft facility is no longer an issue, the interest rate chargeable upon the loan is equivalent to 34.123%. The calculation of the interest rate is as follows:

I RM273,200

---------- X 100 = 34.123%

RM800,000

[31] According to the defendants that it is interesting to note that even a licensed moneylender, the interest shall not exceed 12% for secured loan and 18% for unsecured loan pursuant to s. 17A(1) of the Act. Therefore, it is the defendants' submission that the abovesaid rates of interest are excessive and/or substantially unfair to the defendants and after all, the plaintiff is not entitled to levy any interest and therefore rendered the said transaction illegal.

[32] On that issue, this court found that nowhere in the agreement that states the RM1.2 million is actually RM1 million loan and the RM200,000 is interest. The agreement does not say a word about 'interest'. One cannot contradict what is written in cold print evidence such as the agreement. The court found that both parties accepted and agreed that finally the loan was capped at RM800,000. Not an iota of evidence to show that there was any request for the balance if it is true that the loan should have been more than RM800,000. The court decides based on the four corners of the evidence adduced ie, the agreement. At the start of the agreement, there was no mention of interest whatsoever. The parties agreed on the interest to be included as the court found from the evidence of DW1, the defendants knew that the plaintiff himself has to pay interest for the overdraft facility he obtained. Interest was mutually agreed upon by both parties and DW1 actually agreed and it was him who offered the interest to be included.

[33] The overdraft facility need not be proved by documentary evidence as the existence of it has again been affirmed by both plaintiff and DW1. The admission of DW1 that there was indeed a loan received is not disputed. This court had earlier found that the plaintiff has no ready money at his disposal to loan the defendant and as such he had to utilise the overdraft facility, a fact that DW1 admitted.

[34] Based on the facts and evidence adduced as well as the authorities mentioned in the above, this court found and of the considered view that the Act does not apply to moneylending but only to moneylenders. It does not make every single moneylending transaction illegal and unenforceable. The Act never intended to apply to an individual who lends money even with interest unless he makes a business from it.

[35] From the facts of this case, it is clear that the plaintiff is not a moneylender. There is no system and continuity in moneylending transaction exercised by the plaintiff was shown nor proved. The presumption provided in s. 10O of the Act is a rebuttable presumption and the plaintiff had successfully rebutted the said presumption as he had proven that he is not a moneylender. The defendants failed to overcome two hurdles in this case ie, that the loan was a moneylending transaction and secondly that the plaintiff was carrying the business of moneylender at the material time (*Muhibbah Teguh Sdn Bhd v. Yaacob Mat Yim* [2005] 4 CLJ 853). The

A interest was computed and offered by the first defendant through DW1 and accepted by the plaintiff, and it is unjust for the defendants after benefiting from the loan given to now claim that the loan transaction is void and unenforceable based on the interest element that was proposed and accepted by both parties.

B **[36]** In the upshot, it is the finding of this court that the plaintiff has proven his case on balance of probabilities. The plaintiff's claim was therefore allowed and defendants' counterclaim was dismissed with costs of RM12,000 to the plaintiff.

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